United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

512

JOINT APPENDIX

568

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,142

RESERVATION ELEVEN ASSOCIATES, ET AL., *Appellant*

v.

DISTRICT OF COLUMBIA, *Appellee*

On Appeal From a Final Judgment of the U. S. District Court for the District of Columbia

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[illegible] & ADAMS PRINTING, INC., WASHINGTON, D. C.

INDEX TO JOINT APPENDIX

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JOINT APPENDIX

Docket Entries

DISTRICT OF COLUMBIA, a Municipal corporation

v.

All of Lot 7, in Reservation 11, containing 3,750.00 sq. ft.
All of Lot 8, in Reservation 11, containing 3,750.00 sq. ft.
All of Lot 10, in Reservation 11, containing 3,750.00 sq. ft.
All of Lot 9, in Reservation 11, containing 3,750.00 sq. ft.
All of Lot 11, in Reservation 11, containing 3,750.00 sq. ft.
All of Lot 36, in Reservation 11, containing 2,500.00 sq. ft.
All of Lot 31, in Reservation 11, containing 1,402.96 sq. ft.
All of Lot 32, in Reservation 11, containing 1,339.12 sq. ft.
All of Lot 33, in Reservation 11, containing 1,361.92 sq. ft.
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A Private alley in Reservation 11 ,containing 337.50 sq. ft.
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All of Lot 827, in Reservation 11, containing 8,640.00 sq. ft.

All of Lot 812, in Reservation 11, containing 4,320.00 sq. ft.
All of Lot 813, in Reservation 11, containing 4,320.00 sq. ft.
All of Lot 835, in Reservation 11, containing 8,640.00 sq. ft.
All of Lot 817, in Reservation 11, containing 2,700.00 sq. ft.
All of Lot 826, in Reservation 11, containing 1,851.15 sq. ft.
All of Lot 825, in Reservation 11, containing 253.48 sq. ft.
All of Lot 822, in Reservation 11, containing 430.76 sq. ft.
All of Lot 821, in Reservation 11, containing 430.76 sq. ft.
All of Lot 820, in Reservation 11, containing 430.76 sq. ft.
All of Lot 819, in Reservation 11, containing 1,175.00 sq. ft.
All of Lot 823, in Reservation 11, containing 16,349.00 sq. ft.
All of Lot 824, in Reservation 11, containing 2,401.00 sq. ft.
All of Lot 834, in Reservation 11, containing 23,714.65 sq. ft.
All in The District of Columbia

RESERVATION ELEVEN ASSOCIATES, ET AL.,

AND

UNKNOWN OWNERS

1965 PARTIES

Dec. 29—Reservation Eleven Associates, re Lots 7, 8, 10, etc.—Attorneys: Donohue, Kaufman & Shaw, F. Joseph Donohue, 503 D St., N.W.; Arent, Fox, Kintner, Plotkin & Kahn, 1815 H St., N.W.

Dec. 30—Humble Oil & Refining Co., Lessee—Attorneys: James C. Wilkes & J. Hampton Baumgartner, Jr., Wilkes & Artis, James M. Cashman, 500 Tower Bldg.

1966

Mar. 1—Charles A. Davis, Trustee—Attorney: P. P., 117 N. Fairfax St., Alexandria, Va.

Mar. 1—John W. Dunn, Trustee—Attorney: do

1967

April 4—D. of C.—Attorney: Bruce Mencher, Corp. Counsel's Office

June 2—D. of C.—Attorney: Matthew J. Mullaney, Jr., District Building

July 20—Humble Oil Co.—Attorney: James M. Cashman, Tower Building

Sept. 18—Jerry Maiatico & George P. Lemm—Attorney: Ewing Laporte, National Press Bldg.

Oct. 24—Humble Oil & Refining Co.—Attorney: A. P. Lindemann, Jr.

1968

Feb. 14—American Security & Trust Co.—Attorneys: Alexander B. Howes, Peter Barnes, 815 Conn. Ave., N.W.

May 16—All of Lot 7 in Reservation 11 et al.—Attorney: Paul R. Connolly, 1000 Hill Bldg.

MISCELLANEOUS DOCKET

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

PARTIES:

DISTRICT OF COLUMBIA, a municipal corporation

v.

All of Lot 7 in Reservation 11,
containing 3,750.00 sq. ft., ET AL.,

ACTION: Condemnation

PETITIONER'S ATTY.:

Milton D. Korman
Acting Corp. Counsel
Robert R. Redmon
Asst. Corp. Counsel

RESPONDENT'S ATTY.:

DATE	PROCEEDINGS

1965

Dec. 22—Complaint, Jury Demand, Exhibits A B & C. filed.

Dec. 22—Declaration of Taking.

Dec. 22—Deposited into the Registry by the District of Columbia, the sum of $8,335,400.00.

Dec. 22—Praecipe for the Clerk.

Dec. 29—Petition of Reservation Eleven Associates for payment as to Lots 7, S, 10, etc.; app. Donohue, Kaufman & Shaw, F. Joseph Donohue and Arent, Fox, Kintner, Plotkin & Kahn. filed.

Dec. 29—Order for payment of money as to Lots 7, S, 9, 10, 11, S09, S10, S11 and 36 in Reservation 11; Lots 30, 31, 32, 33, S17, C, 43, S26, 2S, S19, S20, S21, S22, 40, 41, 42, S25 and a private alley in Reservation 11 and Lots S27, S12, S13, and S35 in Reservation 11. Matthews, J.

Dec. 30—Appearance of Arent, Fox, Kintner, Plotkin & Kahn by Joseph M. Fries, Joseph G. Dooley & Donohue, Kaufmann & Shaw as counsel for deft. Reservation Eleven Associates. filed.

Dec. 30—Petition of Reservation Eleven Associates, a limited Partnership, deft. for payment of money as to Lots 823, 824 and 45 in Reservation 11 & Lot 834 in Reservation 11. filed.

Dec. 30—Appearance of James C. Wilkes & J. Hampton Baumgartner, Jr. & Wilkes & Artis as counsel for Humble Oil & Refining Co., Lessee; c/m 12/30/65. filed.

Dec. 30—Consent of lessee, Humble Oil & Refining Co. c/m 12/30/65. filed.

Dec. 30—Order for payment of money as to Lots 823, 824 & 45 in Reservation 11 & Lot 834 in Reservation 11. Matthews, J.

Dec. 30—Paid to Reservation Eleven Associates $4,378,-000.00 by Registry Check #4377 pursuant to order of Court filed 12/29/65 (Lots 7, 8, 10, 9, 11, 809, 810, 811, and 36; Lots 30, 31, 32, 33, 817, C, 43, 826, 28, 819, 820, 821, 822, 40, 41, 42, 825 and a private alley; Lots 827, 812, 813, 835)

Dec. 30—Receipt from District-Realty Title Insurance Corporation for Registry check #4377 (Lots 7, 8, 10, 9, 11, 809, 810, 811 and 36; Lots 30, 31, 32, 33, 817, C, 43, 326, 28, 819, 820, 821, 822, 40, 41, 42, 825 and a private alley. Lots 827, 812, 813, 835). filed.

Dec. 31—Paid to Reservation Eleven Associates $3,957,-400.00 by Registry check #4378 pursuant to order of Court filed 12/30/65. (Lots 823, 824, 45, and 834)

Dec. 31—Receipt from District-Realty Title Insurance Corporation for Registry check #4378 (Lots 823, 824, 45 and 834). filed.

1966

Jan. 18—Notice of Condemnation; Exhibit A. filed.

Mar. 1—Answer of Charles A. Davis, Trustee and John W. Dunn, Trustee, to complaint; Appearance in P.P. filed.

Apr. 13—Notice of Condemnation. filed.

Apr. 13—Certificate of Pltf. as to inability to serve certain defts. filed.

May 9—Proof of Publication, Washington Evening Star; c/m. filed.

1967

Apr. 4—Appearance Bruce Mencher as Attorney for plaintiff. filed.

Apr. 4—Order to vacate and surrender premises. Corcoran, J.

Apr. 4—Order to draw and empanel jury on June 2, 1967 at 9:45 A. M. Corcoran, J.

May 22—Notice by attorney for Reservation Eleven Associates to take deposition of Brig. Gen. Robert E. Mathe; c/m 5/16/67. filed.

June 2—Appearance Matthew J. Mullaney, Jr., as counsel for plaintiff. filed.

June 2—Jurors sworn on voir dire; jury panel discharged due to inability to select jury from number present. (Eva Marie Sanche, Reporter) Corcoran, J.

June 14—Depositions of Thomas F. Airis, Roy C. Hoyle and Robert E. Mathe for Defendant. Fee: $28.75. filed.

June 23—Order to draw and empanel a jury on July 20, 1967 at 1:45 p. m. Corcoran, J.

Jul. 20—Appearance James M. Cashman as attorney for Humble Oil Co. filed.

Jul. 20—Order appointing jury and directing jurors to view land and fixing date of trial for February 19, 1968. Waddy, J.

Sept. 18—Appearance of Ewing Laporte as Attorney for Jerry Maiatico and George P. Lemm; c/m. filed.

Oct. 24—Appearance of A. P. Lindemann, Jr. as counsel for Humble Oil & Refining Co.; c/s/ 10/24/67. filed.

1968

Jan. 17—Pre-trial Proceedings begun; continued until Feb. 12, 1968; trial date continued from Feb. 19, to Feb. 26, 1968. (Order to be presented) Rep. Ida Watson.

....—Transcript of Gesell, J. ac/n.

Jan. 22—Pretrial proceedings before Judge Gesell on Jan. 17, 1968. filed.

Jan. 26—Memorandum of Reservation Eleven Associates concerning Alleys contained within the Sq. bounded by 2, 3, C Sts., N.W. & Constitution Avenue. c/m 1/26/68. filed.

Jan. 26—Memorandum of Law. filed.

Feb. 5—Counter-Memorandum of District of Columbia concerning the alleys contained within the square bounded by 2nd, 3rd, & C Sts. & Constitution Ave., N.W.; P & A's; c/m 2/5/68. filed.

Feb. 6—Pretrial proceedings resumed; Arguments on Proffer of evidence continued to Feb. 13, 1968, 10:00 a. m. (Rep. Ida Watson) Gesell, J.

Feb. 8—Memorandum refusing the proffer concerning the alleys; case will be submitted to jury on issue of "fair value" treating all alleys as open. (N) Gesell, J.

Feb. 13—Further Pretrial proceedings. (Rep. Ida Watson) Gesell, J.

Feb. 13—Exhibits on Proffers Nos. 1 thru 7. filed.

Feb. 14—Appearance Alexander B. Howes & Peter Barnes. c/m 2/14/68. filed.

Feb. 15—Memorandum on additional proffer. (N) Gesell, J.

Feb. 23—Transcript of: Pretrial Conference Feb. 13, 1968 before Gesell, J. filed.

Feb. 26—Trial begun; same jury; same three alternate jurors; Respited until 2/27/68. (Rep. Ida Watson, et al.). Gesell, J.

Feb. 27—Trial resumed; same jury; same three alternate jurors; alternate jurors discharged; verdict: $9,045,-000.00 fair market value. (Rep. Ida Watson). Gesell, J.

Feb. 27—Instruction of counsel for pltff. filed.

Feb. 27—Trial exhibits returned to counsel.

Feb. 27—Report and Award of Jurors in sum of $9,045,-000.00. filed.

Feb. 28—Stipulation of counsel re: settlement of leasehold-Approved Nuc pro tunc 2/23/68 (fiat) Exh. A, B & C. Gesell, J.

Feb. 28—Trial Proceedings Transcript-Vol. I (Court's Copy). Rep. Ida Z. Watson. filed.

Mar. 1—Transcript of Official Court Reporter, Ida Z. Watson, Feb. 27, 1968, Vol. II, Court's copy. filed.

Mar. 18—Objections and exceptions to appraisement of Jury; c/ser 3/18/68. M.C. 3/18/68. filed.

Mar. 26—Order ratifying and confirming verdict of Jury. Gesell, J.

Mar. 26—P & A in opposition to defts.' objections and exceptions to appraisement of Jury. c/m 3/25/68. filed.

Mar. 26—Objections and Exceptions to appraisement of Jury denied (fiat). Gesell, J.

Apr. 15—Order entering judgment in favor of Humble Oil and Refining Company to be paid by Reservation 11 Associates from judgment awarded Reservation 11 Associates in these proceedings in the sum of $980,-000.00 plus accumulated interest agreed to by the parties. Gesell, J.

Apr. 25—Notice of appeal of defendant from judgment of March 26, 1968.
Copy mailed to District of Columbia c/o Corporation Counsel. Deposit by Kaufman. $5.00. filed.

May 9—Transcript of proceedings pp. 1-61; Feb. 6, 1968. (Rep. Ida Z. Watson).

May 16—Appearance Williams & Connolly (Paul R. Connolly) Court's copy as attorney for defts. filed.

May 20—Motion of plaintiff to deposit money into Registry of Court, P & A's, c/m 5/20/68. MC. filed.

May 28—Motion to extend time within which to docket record on Appeal. filed.

May 28—Response of Defendant to motion of District of Columbia to deposit money in the Registry of Court. filed.

May 28—Order granting defendants until and including July 20, 1968 to docket record on appeal. (N) 371/N. filed.

June 14—Order authorizing deposit into Registry portion of jury award which is in excess of deposit. Matthews, J.

June 14—Deposited into the Registry of the Court $814,-760.39 by the District of Columbia.

June 14—Praecipe for the Clerk. filed.

Complaint

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

District Court No. 36-65

DISTRICT OF COLUMBIA, a municipal corporation, *Plaintiff*

v.

All of Lot 7, in Reservation 11, containing 3,750.00 sq. ft.
All of Lot 8, in Reservation 11, containing 3,750.00 sq. ft.
All of Lot 10, in Reservation 11, containing 3,750.00 sq. ft.
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All of Lot 810, in Reservation 11, containing 1,666.00 sq. ft.
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All of Lot S26, in Reservation 11, containing 1,851.15 sq. ft.
All of Lot S25, in Reservation 11, containing 353.48 sq. ft.
All of Lot S22, in Reservation 11, containing 430.76 sq. ft.
All of Lot S21, in Reservation 11, containing 430.76 sq. ft.
All of Lot S20, in Reservation 11, containing 430.76 sq. ft.
All of Lot S19, in Reservation 11, containing 1,175.00 sq. ft.
All of Lot S23, in Reservation 11, containing 16,349.00 sq. ft.
All of Lot S24, in Reservation 11, containing 2,401.00 sq. ft.
All of Lot S34, in Reservation 11, containing 23,714.65 sq. ft.
All in the District of Columbia

RESERVATION ELEVEN ASSOCIATES, ET AL.,
and UNKNOWN OWNERS, *Defendants.*

(Condemnation for the acquisition of land for municipal purposes in Reservation 11 (Construction of Center Leg-Inner Loop) bounded by 2nd Street, N.W., C Street, N.W., 3rd Street, N.W., and Constitution Avenue, N.W., in the District of Columbia.)

Complaint

1. This is an action of a civil nature brought by the District of Columbia for the taking of property under the power of eminent domain, and for the ascertainment and award of just compensation to the owners and parties in interest.

2. The authority for the taking is contained in Title 16, Chapter 13, Subchapter X and XX, inclusive, D. C. Code, 1961 ed., as amended.

3. The use for which the property is to be taken is for municipal purposes, construction of Center Leg-Inner Loop, in the northwest section of the District of Columbia.

4. The interest in the property to be acquired is an estate in fee simple absolute.

5. The property in and to which the aforegoing interest and estate is to be taken is described in "Exhibit A", attached hereto and made a part hereof.

6. The persons known to the plaintiff to have or claim an interest in the property are set forth in "Exhibit B", attached hereto and made a part hereof.

7. The location of said property is shown in plat marked "Exhibit C", which is attached hereto and made a part hereof.

8. The District of Columbia may have or claim an interest in the property by reason of taxes and assessments due and exigible.

9. In addition to the persons named, there are or may be others who have or may claim some interest in the property to be taken, whose names and addresses are unknown to the plaintiff, and such persons are made parties to the action under the designation "Unknown Owners".

WHEREFORE, plaintiff demands:

1. That an order of publication issue against all unknown owners of the properties involved in this proceeding.

2. Judgment that the properties be condemned, and that just compensation for the taking be ascertained and awarded, and for such other relief as may be lawful and proper.

/s/ MILTON D. KORMAN
Milton D. Korman
Acting Corporation Counsel, D. C.

/s/ JOHN A. EARNEST
John A. Earnest
Assistant Corporation Counsel, D. C.

/s/ LYMAN J. UMSTEAD
Lyman J. Umstead
Assistant Corporation Counsel, D. C.

/s/ ROBERT R. REDMON
Robert R. Redmon
Assistant Corporation Counsel, D. C.

Attorneys for Plaintiff
District Building
Washington, D. C. 20004

Trial by jury of the issue of just compensation is demanded by plaintiff.

Pretrial Conference of January 17, 1968

[p. 4] MR. BELL: Yes, Your Honor. I would state the stipulation this way:

It is hereby stipulated between counsel for Reservation 11 and the District of Columbia that applications which were made by Parkwood, Inc. to close alleys in Reservation 11, Number S. O. 59-67, in 1959, and S. O. 61-81, on November 1, 1961, were opposed by the District of Columbia because the center leg of the Freeway, according to the plans at that time, was going to go through Reservation 11, and for this reason the applications were not approved.

[p. 5] MR. BELL: It is hereby stipulated between the attorneys for Reservation Eleven Associates and the District of Columbia that the records of the District of Columbia indicated that from approximately 1912 to approximately March 1 of 1967 there were no charges for alley closings in the District of Columbia.

Hearing on Proffer of Proof of February 6, 1968

[p. 32] THE COURT: The Court is interested to hear a discussion of the Nash case. The Court is interested to hear a specific response to the position the Government has taken in its papers, which basically is that this is a discretionary matter, and that as owners of the land, the land being in the possession of the United States, they properly exercised their discretion in refusing to close, because of the possibility or probability or whatever you want to call it that this freeway would go through this particular location.

[pp. 48-49] THE COURT: Well, the value of the property isn't the point. The question is whether or not it has been the uniform, continued practice of the District to permit closing of alleys where all of the contiguous land is owned by a single land owner. Now the land owners here say that has been the uniform, accepted practice. What do you say about that?

[p. 49] MR. BELL: I say that we have seen no proof of that, Your Honor.

THE COURT: Well, we are here on a proffer. The Court must assume that that is the uniform, standard practice because that is what the land owner proposes to show.

MR. BELL: Well, all I can say, Your Honor, is I have not been able to find any evidence of such a practice in a similar case in that I have found no similar cases where original alleys in downtown Washington where we have closed an entire square. I thought I had found one involving a hotel on Connecticut Avenue but it developed there were no alleys in that square.

THE COURT: But where there have been alleys in not comparable property, it has been the practice to permit them to be closed, I take it.

MR. BELL: And we have also opposed. The Nash case, offhand, is one in 1958 that we did not close, although that did not involve an entire square.

Memorandum of February 8, 1963

As part of the pretrial of this condemnation case the defendant landowners have made a proffer of proof to include certain alleys in the property to be valued and the issues were briefed and argued to the Court by the parties.

Defendant landowners offered to prove at the trial the following salient facts, modified by a few uncontested facts presented by the District:

(1) The property known as Reservation 11, which is the subject of the taking by the District of Columbia, was assembled commencing in 1958 and completed by February 1962.

(2) Two alleys cross the square running east and west and one runs north and south over a substantial portion of

the property. These alleys are so-called "original alleys" and are the property of the United States.

(3) Application to close some of the alley space was made in October 1959 and in October 1961 application was made to close all the alley area. These applications were energetically pursued by the landowners at all times, objections were raised by the Highway Department and the Commissioners never acted on the applications.

(4) It had long been publicly known that the south loop of the inner freeway might pass across or in the neighborhood of the property, above or below ground, but there was strong public opposition and Congressional approval, appropriations and other necessary preliminary approvals were lacking. Although there were no definite or settled plans for the precise location of the freeway, the District did not approve the alley closing applications because of the possibility the freeway would involve the property.

(5) Following a hearing on September 3, 1963, the Board of Commissioners by order dated October 10, 1963, gave general approval to the concept of the proposed center loop of the inner loop between Second and Third Streets (where the property in question lies) and between Constitution Avenue and Massachusetts Avenue, but the precise location of the route or its characteristics were still not stated.

(6) The practice of the District Commissioners has for many years been to agree to alley closings where application is made and there is no opposition from contiguous landowners.

(7) The alleys, which contain some 17,265 square feet, have a substantial value and their closing to permit use of the entire area for a single structure would substantially and materially increase the value of the property.

(8) The date of taking was December 22, 1965. The alleys were still open at this time, no order closing or refusing to close having been entered.

It is first asserted that the action of the Commissioners in not closing the alleys was arbitrary and discriminatory and that for purposes of determining "fair value" the alleys should be treated as closed. The Court rejects this proposition and refuses any proffer on this theory. Whether the applications for closing be considered to have been made under Chapter IV, Title VII, Sec. 401, as the Government contends, or under Chapter III, Title VII, Sec. 305, as the landowners contend, the Commissioners had discretion, their function with respect to alley closing is not purely ministerial and routine, and their unwillingness to allow the alleys to be closed was not shown to be arbitrary under the circumstances, particularly when there was no showing that an alley closing has ever been permitted where a public taking was in prospect. *Cf. Nash* v. *D. C. Redevelopment Land Agency,* U.S. App. D. C. No. 20,410, decided October 23, 1967.

It is next asserted that the Government's refusal to close the alleys based on the strong possibility that the freeway would traverse the property was an action contrary to usual practice caused by the prospect of the taking and that the landowners are entitled to have the property valued as of time of taking, unaffected by any freeway plans. The landowners urge that under the practice of the District the possibility existed that an owner at time of taking could have closed the alleys if the freeway was not under consideration and that this possibility, however uncertain, should be placed before the jury.

The District counters by claiming that the possibility of any alley closing is in effect ephemeral considering the great value of the alleys, the fact that various freeway plans involving the area of the property have been repeatedly and publicly discussed since 1945, that only a very knowledgeable buyer would be interested in a property of this magnitude and value and would have first ascertained the District's persistent negative attitude. The

District's position somewhat begs the question since the position of the District rests on the existence of freeway plans and landowners urge these plans should be disregarded. It is the settled rule in this jurisdiction, moreover, that in determining the compensation for the land being condemned the jury shall not take into consideration any effect, whether it be enhancement or diminution, which the purpose or intention of the District to acquire the property for public use may have had upon its value. *Murray* v. *United States*, 130 F.2d 442 (1942). This rule does not, however, well fit the facts of this case. If it should prove to be the fact that the alleys would be likely to be closed but for the first public announcement of a definitive decision to put the freeway across the property, by analogy to the cases dealing with possible future zoning changes, it might be appropriate to permit the jury to consider the closing possibility. *United States* v. *Meadow Brook Club*, 259 F.2d 41 (2nd Cir. 1958).

The difficulty is, however, that the District may close only as a discretionary matter and give the unique characteristics of the property here involved the District's past practice is no measure of its possible future conduct. It would be an unrealistic rule of law that required the District to turn over land to private parties under circumstances where it was reasonably likely that the land would have to be later condemned and paid for. It was not shown by the proffer that any situation quite comparable to the present one has come to issue, considering the prime location of the site and the substantial area covered by the alleys. It was not the specific taking that interfered with the alley closings but long-standing amorphous ever-changing plans which might involve the particular property at some indefinite future time in some indefinite future way. The matter is further complicated by the added uncertainty that if the closing were to take place pursuant to Chapter IV, Title VII, Sec. 401, which may well apply when the United States owns the fee of an original alley,

equitable compensation of some kind for the land would be assessed against the landowner.

The landowners have not carried their burden. This issue as tendered by the proffer is entirely too conjectural and the possibility too remote. To interject it into the trial would only confuse and distract the jury from the central issue. Accordingly, the proffer is refused on the second contention as well and the case will be submitted to the jury on the issue of the "fair value" of the property, treating all alleys as open without any proof or argument as to the efforts to close them or the prospects of the alleys beng closed by action of the District in the absence of a freeway project or otherwise.

/s/ GERHARD A. GESELL
United States District Judge

February 8, 1968.

Pretrial Conference of February 13, 1968

[pp. 23-24] Obviously, it seems to the Court the starting point would be to stipulate the date of taking, which I guess is agreed already, is it not?

MR. BELL: Yes, Your Honor.

THE COURT: And that is?

MR. BELL: December 22, 1965.

THE COURT: We can stipulate that, can we not, gentlemen?

MR. KAUFMANN: Yes, that is right.

[p. 27] THE COURT: —differently as to that.

We would be able to stipulate that the highest and best use of these various pieces of land in the Reservation Eleven is office buildings.

MR. KAUFMANN: The construction of an office building or buildings.

THE COURT: Within the existing zoning.

MR. KAUFMANN: As I say, if Your Honor pleases, a building or buildings, because it will be our contention that a single building—we wish to preserve our position that if

these lots were together, the alleys closed, it would be a single building as opposed to five separate buildings.

THE COURT: The Court understands that that point is preserved in its entirety. The Court found that on your proffer it would substantially increase the value of the property if the alleys were closed. It doesn't seem to me that it is necessary to put to the jury what would be done if the alleys were closed. That issue is out.

[pp. 28-29] MR. BELL: Your Honor, I think we would be willing to stipulate that as far as any question of appeal is concerned, that it be agreed that any rights or any claim that they may make based upon any alley closing is hereby preserved.

[p. 29] MR. BELL: Right, and anything that happens in the rest of the pretrial or trial, itself, should in no way be construed as a waiver on their part of any rights that they may have had if the first ruling of the Court had been different.

[pp. 29-30] MR. KAUFMANN: No. I would like to amend the proffer. In other words, for the sake of argument—I am sure the Court understands—if the area in red on this large plat were to embrace 17,000 feet, and if it were obviously as we would put it to the back of the square, the C Street side, the alleys were obliterated, closed, and the 17,000 feet placed there, then a single buildng could be built instead of five separate buildings, and we think that the supporting citations to 303 indicate that there is less if any discretion at all in the Commissioners to object to such a treatment.

[p. 30] THE COURT: I think the way to deal with that would be for the Court to consider that question before the trial and to add to the prior ruling whatever conclusion the Court reaches about that possibility.

[pp. 41-42] THE COURT: The Court's understanding of a proffer is that when a party makes a proffer, he offers to prove those facts and the Court ruled on the proffer on the assumption that the facts offered would be proven. I can't say it any clearer than that.

[p. 42] MR. KAUFMANN: All right.

THE COURT: The Court would expect the Court of Appeals would have before it the written submissions by both parties on the proffer, the transcript of the argument before the Court, and all of the exhibits which were identified by Mr. Donohue or mentioned by any other party in the course of that discussion.

Now, that is my conception of what we have because I said to Mr. Donohue that he could expand his proffer in any way by his oral presentation which he undertook to do with great care.

[p. 43] MR. DONOHUE: I had the impression that counsel for the Government had identified a document which would seem to contain the chronological development.

THE COURT: That is right.

MR. BELL: Your Honor, I read from this document. I did not put it in. If you would like it in, I would consent.

MR. DONOHUE: I would like it.

THE COURT: The Court would like to have it in. The Court referred to it.

MR. DONOHUE: Should we mark it the next number for the Plaintiff, No. 7?

THE COURT: Yes, make it Plaintiff's 7.

[pp. 44-46] MR. KAUFMANN: If the Court pleases, this leaves open the letter written to me by the District which has to do with the alley situation which the District indicated they might not wish to cover by stipulation, they might withdraw from their stipulation for the purpose of our proffer. I got the impression a few minutes ago that it was stipulated that the alley closings had been historically granted without charge.

THE COURT: There was a disagreement about that as to dates. As the Court recalls it, Mr. Bell stated that on further investigation he found that for a period, the Court seems to recall 1946—

MR. BELL: From '46 to '52.

THE COURT: —from '46 to '52 there had been some evidence of payment, that there had been no evidence of any

payment since '52 or prior to '46 that he had been able to find.

MR. BELL: There had been one in 1912, but other than that, there had been none except from '46 to '52.

THE COURT: It did appear to the Court, Mr. Kaufmann, that if by inadvertence Mr. Bell had indicated that there had never been payment and his subsequent research indicated there had for those years, the record should be modified in that regard, but the Court did assume that there was no payment since 1952 and that there were payments only in those six years.

If you wish to record that in any way as part of the proffer, I think the prior transcript shows that, but if you wish to make it more formal in some way, it would seem to the Court that you could at this stage.

MR. KAUFMANN: That was the point I made earlier in the argument.

THE COURT: Very well. Maybe Mr. Bell could make a statement that would be considered part of the proffer.

MR. BELL: Your Honor, I would state that as of the time of the discussion in this case the only evidence that I was able to find of any charging for alleys in the District of Columbia prior to the date of taking in this case was one case in about 1912, and seven cases from 1946 to 1952, and that we had searched and been unable to find any charges from 1952 until December 22 of 1965.

THE COURT: The Court recalls that that statement was made on the prior argument and the Court so understood the facts when it made the ruling. Mr. Bell's present statement may be considered as part of the record on the proffer.

[p. 47] THE COURT: It has been stipulated between the parties in this proceeding that the property in question was taken by the District of Columbia on December 22, 1965.

That the highest and best use of the property in question is the construction of office buildings within the existing zoning regulations.

Donahue's Exhibit No. 7

CENTER LEG

Dec. 1946—Appeared in general concept in "Transportation Plans for Washington" as the "Mid-City Expressway."

Aug. 2, 1947—Routing approved by Bureau of Public Roads.

Oct. 1955—Appeared in concept as the "Center Route" in the "Report on Inner Loop Freeway System District of Columbia." (DeLown)

July 1957—Approved by D.C. & BPR as a part of the Sect. 108(d) Report. It is shown as "Interstate Route—FAI-03."

Aug. 1958—Add to Public Works Program.

Dec. 1958—Approved by D. C. Board of Commissioners.

July 1959—Center Leg concept in 1959 MTS Report.

Aug. 1960—Designated by D.C. & BPR as a part of the Sect. 104(b)5 Report. It is shown as FAI-95.

March 9, 1961—Letter from BPR deleting Center Leg from System.

May 8, 1961—Letter from DHT submitting report (dated April 28, 1961) presenting justification for retention of Center Leg as part of System.

May 1961—Center Leg concept appears in Yer 2000 Plan.

Jan. 15 & 24, 1962—Letter from BPR stating no change in their decision.

Feb. 6, 1962—Letter from DHT restating their objection to the deletion.

Nov. 1962—NCPC recommended favorably the Center Leg in the Fiscal Year 1964 program.

Nov. 1, 1962—Included in NCTA plan.

Sept. 3, 1963—Hearing for Center Leg.

Oct. 10, 1963—D.C. Board of Commissioners approved from S. W. Freeway to Massachusetts Avenue.

Jan. 14, 1964—House Building Commission approved the Center Leg.

Mar. 19, 1964—Downtown Progress passed a resolution supporting the Center Leg.

Mar. 31, 1964—Geometrics plan sent to BPR.

April 8, 1964—Tunnel beneath Mall approval of a House Public Works subcommittee.

July 8, 1964—Approved by Senate.

July 21, 1964—Public Law 88-381, authorizing the construction of the tunnel under the Capitol Grounds and under the Mall, was approved.

July 24, 1964—D.C.F.A. No. 2510 approved by Board of Commissioners for design and preparation of contract plans from D Street, S.W. to D Street, N.W. by D. G. Volkart.

June 10, 1965—NCPC reviewed and approved the alignment and concept of the portion of the Center Leg between D Street, N.W. & New York Avenue, N.W.

Memorandum of February 14, 1968

At the further pretrial held in this matter on February 13, counsel for Reservation 11 made an additional proffer with respect to the alley question covered by the Court's Memorandum opinion of February 8. The Court's attention was directed to Title 7, Section 303, of the Code, captioned, "Alleys may be closed on dedication of new ones—Application of property owners—Future ownership of closed alleys—Plats recorded." Counsel for Reservation 11 contend that under this provision of the Code they should be entitled to present to the jury the possibility that under this provision the area now comprised of the alleys might be dedicated to the District of Columbia and an equal area, to stretch across the north end of the reservation, be dedicated in lieu of the alleys as property belonging to the District. It is suggested on authorities of *Compton* v. *Randolph*, 56 App. D.C. 211, 12 F. 2d 152 (D.C. Cir. 1926) and *Barnard* v. *Commissioners*, 100 App. D.C. 404, 246 F. 2d 685 (D.C. Cir. 1957) that the District, upon such an application, which has not been made, would be without discretion and required to accept the proposed realignment of the properties. Accordingly, it is urged that the possibility is sufficiently real and imminent to be taken into account by the jury, thus permitting Reservation 11 to value an office building constructed on the entire reservation, eliminating only the portion on the north to be dedicated to the District. If this eventually were to occur a higher valuation for the property at time of taking could probably be demonstrated by expert testimony.

This proffer is subject to the same infirmities indicated in this Court's prior decision in that any such application would have to be made against the long-standing prospect that the freeway would go through the property. The Court concludes that the District under Section 303 has a discretionary authority which it may or may not exercise if and when application is made and there is no reasonable possibility that this discretion would be exercised in favor

of Reservation 11 under the circumstances. The District would not relocate the property in Reservation 11 owned by the United States so as to enable the owners to obtain a higher value for the land likely to be taken by condemnation. All of the prior proffer as to the alley questions and the arguments and exhibits presented by the parties have been considered in connection with the ruling on this additional proffer. Further, the Court concludes as a matter of law that Section 303 does not contemplate the total extinction of alleys to be substituted, in effect, by a parcel of open land. Accordingly, the proffered proof will not be received.

(Signed) GERHARD A. GESELL
United States District Judge

February 14, 1968.

Trial Transcript of February 26, 1968

[pp. 21-22] A. Reservation 11 comprises an entire city block which is bounded on the south by Constitution Avenue, on the north by C Street, on the east by Second Street and on the west by Third Street, in Northwest Washington.

It is basically subdivided into five parcels: Two north corner sites, containing 25,920 square feet each, two inside sites containing 26,250 square feet each, and a south parcel containing 23,714.65 feet.

[p. 91] MR. BELL: Your Honor, just to get something on the record, I would like to proffer that I would ask Mr. Furman if he determined what Parkwood had paid to assemble Reservation 11, and I now have the actual figure that has been provided by Mr. Furman. Mr. Furman's answer would be $3,216,570. I believe Your Honor would rule—

THE COURT: As the Court has already indicated to counsel in chambers, it does not appear to the Court that the price paid for the property should come before the jury, and as a matter of discretion, I exclude evidence as to the price.

It appears to the Court that the assemblage of this property took place commencing as early as July 1958, and, therefore, certainly some of the prices involved are too remote. And in any event, it is clear that the assembly was accomplished in the face of a compulsion, coercion or compromise, and accordingly under the ruling in the H.H. Supply Company vs. United States, 194 Fed 2nd, and in the Hanon case, 76 U.S. Appeals D.C., the evidence will not be received.

MR. BELL: Thank you, Your Honor.

We are ready to proceed then.

Trial Transcript of February 27, 1968

[pp. 300-302] How do you determine fair market value? Surely it can't be determined by any mathematical formula. It can't be calculated or computed arithmetically. Fair market value is defined in the law as the price which a willing seller who is not obligated to sell would be willing to accept and the price which a willing buyer who is not obligated to buy would be willing to pay for the property. That is what you have to determine. What, in other words, would these pieces of property with their improvements as they may have upon them sell for in the open market as between a willing seller who is not compelled to sell and a willing buyer who is not compelled to buy?

In determining the fair market value, you must consider all of the circumstances concerning which testimony has been given. You must consider the legal use to which the property may be put by the owners and you may consider the most advantageous and the most valuable use to which the property may be put by the owners and you may consider the most advantageous and the most valuable use to which that property could be put in determining its fair market value. In other words, you are not limited to considering the value for the use to which the property was being put at the time it was taken but you have a right to

consider the most advantageous and the most valuable use of which that property is capable.

By the most valuable use of which a property is capable, I mean either some existing use or some use which were the property not taken by the District would affect the present fair market value of the property and would be taken into account by the seller and the buyer under fair market conditions.

You are to determine the fair market value as though this proceeding had never been brought, as though there were a voluntary sale between a willing buyer and a willing seller, the seller not being compelled to sell and the buyer not being compelled to buy.

In determining the fair market value, you must ignore any impression you may have from the evidence or which is in your general knowledge that the District may from time-to-time have contemplated using any of the land constituting Reservation 11 for any public purpose.

You understand, I am sure, that in arriving at the fair market value, you may not base your conclusion on surmises, conjectures and speculations. You have to base it on the testimony, on the evidence that has been adduced, plus one other circumstance. You have had an opportunity to view the property and to examine it, and as as result of the view, you were enabled to see for yourself the nature, character and location and general surroundings of the property, and you may take these matters into consideration in reaching your determination.

[p. 311] THE CLERK: Will the Foreman please rise.

Mr. Foreman, has the jury agreed upon a verdict?

THE FOREMAN: It has.

THE CLERK: May I have it, please.

(Whereupon the verdict was submitted to the Clerk.)

THE CLERK: Will the jury panel please rise.

Members of the jury, your Foreman says that you find in writing $9,045,000 as the fair market value for the property involved, and this is your verdict so say you each and all?

Order Ratifying and Confirming Verdict of Jury

Upon motion of plaintiff to ratify and confirm the Verdict and Award of the Jury returned herein on the 27th day of February, 1968, as to Lots 834, 824, 823, 45, 7, 8, 10, 9, 11, 809, 810, 811, 36, 827, 812, 813, 835, 30, 31, 32, 33, 817, C, 43, 826, 28, 819, 820, 821, 822, 40, 41, 42, 825 and a private alley, all in Reservation 11, and the Court having overruled the objections and exceptions filed by the defendant to the Verdict and Award of the Jury as to the above listed property,

It is, by the Court, this 26 day of March, 1968,

ORDERED: That the said Verdict and Award of the Jury is, and the same is hereby, in all respects finally ratified and confirmed as to Lots 834, 824, 45, 7, 8, 10, 9, 11, 809, 810, 811, 36, 827, 812, 813, 835, 30, 31, 32, 33, 817, C, 43, 826, 28, 819, 820, 821, 822, 40, 41, 42, 825 and a private alley, all in Reservation 11.

A TRUE COPY

ROBERT M. STEARNS, *Clerk*

(Signed) GERALD A. GESELL
United States District Judge

[Filed April 25, 1968]

Notice of Appeal

Notice is hereby given this .... day of April, 1968, that RESERVATION ELEVEN ASSOCIATES, A LIMITED PARTNERSHIP, DEFENDANT, hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 26th day of March, 1968 in favor of said RESERVATION ELEVEN ASSOCIATES, A LIMITED PARTNERSHIP, Defendant, against said DISTRICT OF COLUMBIA, a Municipal corporation, plaintiff.

J. A. KAUFMANN
F. JOSEPH DONOHUE
Attorneys for defendant

JOSEPH M. FRIES
Attorney for defendant

Filed April 25, 1968

BRIEF FOR APPELLANT

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,142

RESERVATION ELEVEN ASSOCIATES, ET AL., *Appellant*

v.

DISTRICT OF COLUMBIA, *Appellee*

On Appeal from a Final Judgment of the U. S. District Court for the District of Columbia

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PAUL R. CONNOLLY
1000 Hill Building
Washington, D. C. 20006
Attorney for Appellant

Of Counsel:

WILLIAMS & CONNOLLY
Washington, D. C.

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INDEX

TABLE OF CASES

TABLE OF TREATISES

---

* Cases chiefly relied upon.

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BRIEF FOR APPELLANT

STATEMENT OF QUESTION PRESENTED

Whether, in a condemnation proceeding, the fair market value of condemned property may be influenced by the fact that prior to condemnation the District of Columbia had opposed the closing of alleys on the property and the assemblage of the property into one unified tract because of the likelihood that the property might someday be condemned?

This case has not been before this Court before, either under this title or a different title.

JURISDICTIONAL STATEMENT

The Appellee filed in the United States District Court for the District of Columbia a complaint for the taking of property under the power of eminent domain and for the ascertainment and award of just compensation to the owners and parties in interest.

On March 26, 1968, the District Court entered an order ratifying and confirming the jury's award of just compensation. A notice of appeal was filed on April 25, 1968. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE CASE

On December 22, 1965, the District of Columbia under its power of eminent domain took the property known as Reservation 11. (JA 17, 22) Reservation 11 is the city block in northwest Washington which is bounded on the south by Constitution Avenue, on the north by C Street, on the east by 2nd Street, and on the west by 3rd Street. (JA 27) It is traversed by two alleys running east and west and one alley running north and south over a major part of the property. (JA 16-17) The alleys which contain some 17,265 square feet divide the property into five parcels: two north corner sites containing 25,920 square feet each, two inside sites containing 26,250 square feet each and a southern parcel containing 23,714.65 square feet. (JA 27) The Esso Building formerly occupied the southern parcel. With the exception of two small buildings on the northwest parcel, the four northerly parcels were undeveloped. All parcels were owned on the day of taking by Appellant, Reservation Eleven Associates.

Application was made in October, 1959 to close some of the alley space on Reservation 11. Application was made in November, 1961 to close all the alley space and to as-

semble the five parcels into one unified tract. These applications, although energetically pursued, were never acted upon. The District of Columbia opposed the closings because the center leg of the inner city freeway, according to the plans of the time, was to go through Reservation 11. (JA 15)

The Appellant at pretrials sought to have the alleys included in some manner in the valuation of Reservation 11. At a pretrial on February 6, 1968, the Appellant asserted (1) that the failure to close the alleys was arbitrary and that for purposes of valuation the alleys should be treated as closed (JA 18) and (2) that, alternatively, valuation should take into consideration the probability that absent the eminent domain plans for the property the alleys would have been closed. (JA 18) At a further pretrial on February 13, 1968, the Appellant asserted that valuation should take into consideration the probability that the alleys might be closed in return for the property owner dedicating to the District of Columbia a space, running across the north end of Reservation 11, equal in area to the alleys. (JA 26)

The Appellant's pretrial proffers were refused. In memorandum opinions of February 8th and 14th, 1968, the District Court ruled that the condemnation jury would not be allowed to consider the effect on the value of Reservation 11 of the probability that the alleys on it might be closed. Fair market value was to be determined as if the alleys were open. The jury would value the property as five separate parcels and not as one unified tract.

On February 27, 1968, a District Court jury set the fair market value of the five parcels at $9,045,000. (JA 29) The District Court, on March 26, 1968, signed an order ratifying and confirming the jury verdict. (JA 30)

STATEMENT OF POINTS

The District Court erred in not allowing the condemnation jury to consider the value added to the Appellant's property by the probability that the alleys on the property would be closed and that the property would be assembled into one unified tract.

SUMMARY OF ARGUMENT

In valuing property taken under the power of eminent domain, the measure of compensation is the fair market value of the property just prior to the taking. Fair market value includes not only the value of the property in its present state, but also the value added by the prospects of future use. Mere speculation or conjecture about future use is not sufficient for its inclusion in valuation. It must be shown that the probability of future use would influence the price a willing buyer and a willing seller would agree upon.

The Appellant sought to have the District Court jury value its property on the probability that the alleys on its land would be closed and the parcels assembled as one unit. The Court refused, saying that the probability was too speculative. It reasoned that the District of Columbia would not have permitted the assembly, because it believed that someday the property might be condemned and because it desired to avoid any action that would increase the fair market value of the land.

In removing this issue from the jury's consideration the District Court erred in considering whether the District of Columbia would have opposed the closing because of its belief that the property might someday be condemned and because of its desire to hold down the fair market value of the land. It is not asserted that the Court cannot consider any other opposition of the District of Columbia to the proposed assemblage; it is only asserted that it was error to consider these particular reasons of opposition. Allowing

these reasons of opposition to affect the fair market value of the condemned property permits the District of Columbia to depress the value of the land solely for the purpose of taking advantage of this depression in the price it must pay for the property when it is eventually condemned.

ARGUMENT

The measure of compensation for property taken under the powers of eminent domain is the fair market value of the condemned property, just prior to the taking. *U. S.* v. *Miller,* 317 U.S. 369, 373-374 (1943). Fair market value, in turn, is:

> "the price which a willing seller, who is not obliged to sell, would be willing to accept and the price which a willing buyer, who is not obliged to buy, would be willing to pay for the property."

H & R Corp. v. *District of Columbia,* 122 U.S. App. D.C. 43, 45, 351 F. 2d 740, 742 (1965).

In their appraisal of land, a willing buyer and a willing seller would not only consider the use to which the property was being put at the time of their bargaining. They would also consider the highest and most profitable use for which the property could be adapted. A condemnation jury in valuing property must also take into account the highest and most profitable use for the property. E.g., *U. S. ex rel. T.V.A.* v. *Powelson,* 319 U.S. 266, 275-276 (1943); *Olson* v. *U. S.,* 292 U.S. 246, 255 (1934). For example, farmland or property on the outskirts of a growing community need not be valued in its existing state. If the burgeoning of the community indicates that the property might have future commercial or residential use, the value which a willing buyer and a willing seller would place upon the probability of that future, more profitable use is part of the fair market value of the property. Such a factor, of course, must be considered by a condemnation jury in fixing the amount of the valuation award.

However, condemned property is not to be valued by a condemnation jury as if it were in fact being used for its higher and more valuable purpose. Its valuation should depend upon the degree to which the probability of the future use affects the market price. E.g., *H & R Corp.* v. *District of Columbia, supra; United States* v. *Meadow Brook Club,* 259 F. 2d 41, 45 (2nd Cir.), *cert. denied,* 358 U.S. 921 (1958).

If the chance of a future and more profitable use is so remote or so speculative that it would not be considered by a willing buyer and a willing seller, a condemnation jury will not be permitted to consider such a contingency in making its evaluation of the property. Accordingly, evidence of such speculative future use will be excluded.

The District Court had no disagreement with the above principles. Its pretrial memorandum opinions and its charge to the jury reflect this view. (JA 16-20, 26-29) However, in determining whether the probability that the alleys on Reservation 11 would be closed was too remote or speculative, the District Court erred in considering the District of Columbia's opposition to the closings because that opposition was based on the District's belief that someday the property might be condemned and its resultant desire to hold down the property's fair market value. The consideration of such evidence conflicts with existing law and requires this Court to reverse the judgment below and remand the case for a new trial.

During the various pretrials in this case, the Appellant sought to have the fair market value of the condemned land reflect the probability that, absent condemnation, the alleys on it would have been closed outright or closed in return for the dedication by the owner to the District of Columbia of a space, running across the north end of Reservation 11, equal in area to the alleys. The District Court refused to allow the jury to consider this contingency because it found the evidence "entirely too conjectural

and the possibility too remote." (JA 20) It found that "long-standing amorphous ever-changing plans which might involve the particular property at some indefinite future time in some indefinite future way" would cause the District of Columbia not to close the alleys. (JA 19) The Court simply said that the District of Columbia would not have closed the alleys because someday it might condemn the land.

It took this approach not only as to the probability that the alleys would be closed outright but also as to the probability that the alleys would be closed in return for dedication of other land. The District Court found the second proffer:

> ". . . subject to the same infirmities indicated in the Court's prior decision in that any such application would have to be made against the long-standing prospect that the freeway would go through the property." (JA 26)

The Court reasoned that if the land might someday be condemned, the District of Columbia would obviously refuse to close the alleys and permit the assembly of one unified tract so as to hold down the price it would have to pay on condemnation:

> "The District would not relocate the property in Reservation 11 owned by the United States so as to enable the owners to obtain a higher value for the land likely to be taken by condemnation. (JA 27)
>
> • • •
>
> "It would be an unrealistic rule of law that required the District to turn over land to private parties under circumstances where it was reasonably likely that the land would have to be later condemned and paid for." (JA 19)

This ruling allows the District of Columbia to control the condemnation award irrespective of its fair market value. It permits the District apparently to offer fair

market value for property while actually reducing that value so as to save money. Fair market value becomes not what a willing buyer and a willing seller would agree upon, but a value determined with the District's thumb on the scales.

In the few instances where governments have tried this practice of lowering fair market value, the courts have rejected the tactic.

In *In Re Inwood Hill Park, in Borough of Manhattan*, 243 N.Y.S. 63 (1930), the property owners claimed that the availability of their land for use as apartment house sites should be given consideration in determining fair market value. The lower court refused to hear such evidence because the probability was so remote, due to the facts that the city had withheld its approval for such development and that "there was practically no likelihood of the city ever approving such plans in view of its contemplated taking of the property for park purposes." *id.* at 67.

On appeal it was argued that the case should be excepted from the rule of giving consideration, in determining fair market value, to the prospective uses of the property. The reasoning behind this argument was that:

> "the contemplated taking by the city of lands adjacent to the then existing parks made it practically certain that the city would not approve of plans for the development of such lands for apartment house sites, and thus render them available for that use." *id.* at 69-70.

The court would have nothing to do with this argument. It boldly stated:

> "This contention is untenable. The city could not lawfully thus deprive the owners of the lands taken of their right to receive their true market value. Carried to its logical conclusion, to sustain this contention of the respondent would enable it to prevent any development whatsoever of lands which it might desire to acquire at some time in the future, for the purpose of preventing enhancement of the value of said lands.

> Such a contention is unconscionable and does violence to established principles of law and equity." *id.* at 70.

The court continued at 70-71:

> "The owner of lands being entitled to their fair market value for the most profitable use for which the property is available, this use cannot be cut down because the condemnor is in a position to refuse a consent necessary to make available the lands for such use, and does so refuse because of the effect upon the price in a contemplated condemnation. Each owner, so long as he is holding the property, is entitled to be considered in the same position as if his lands were not to be sought in condemnation."

In *U. S.* v. *Meadow Brook Club*, 259 F. 2d 41 (2d Cir.), *cert. denied*, 358 U.S. 921 (1958), the court held that the probability that residential property could be rezoned for industrial use was a proper component of fair market value. It further held that evidence of the government's opposition to the rezoning was a proper consideration in determining the degree of probability, but only if the opposition were made in good faith. "Good faith," it reasoned, precluded any consideration of opposition based on a desire to depress the value of the property:

> "But it is also clear that if the government's sole motive in resisting the change in zoning was to depress the market value of the property which it then intended to condemn, the court's estimate of the probability of rezoning (as a factor entering into the ultimate calculation of value) should not have reflected this opposition." *id.* at 45.

Opinions of other courts have followed the *Innwood Hill Park* and *Meadow Brook Club* cases, albeit not with the same precise reasoning. In *Evans* v. *Mississippi State Highway Commission*, 197 So. 2d 805 (Miss. 1967), parcels of land were zoned residential at condemnation. Even though the property surrounding the condemned land was

zoned commercial, rezoning was refused because of the impending use of the land for eminent domain purposes. The court, however, ignored the refusal to rezone and held that the highest and best use of the property was commercial. In *Budney* v. *Ives*, 239 A. 2d 482 (Conn. 1968), the property owners sought rezoning to permit the use of their land as a motel site. Their application was denied. The land was then condemned. Evidence was adduced that the rezoning had been refused because plans existed to condemn the land. Nevertheless, a special referee based his valuation, in part, on the strong probability of a zoning change as desired by the owners. The referee did not consider the rezoning denial. His actions were affirmed by the Connecticut Supreme Court.[1]

The District Court established law that is antithetical to the above cases. What other courts would have ignored, it relied upon. The Court stressed rather than disregarded the fact that the District of Columbia would have refused the closings because someday it might condemn the land and because it desired to hold down the price it would have to pay.

Had the District Court followed the existing law, it would not have ruled that the probability of the closings was too speculative. It was stipulated that the alley closings and the assembly of the land "were opposed by the District of Columbia because the center leg of the freeway, according to the plan at that time, was going to go through Reservation 11, and for this reason the applications were not approved." (JA 15) There exists not only the absence of valid objections by the District of Columbia to the alley closings, but also the presence of positive proof that had the probability been correctly weighed, it would have been

[1] See also, *U. S.* v. *Certain Property, Etc.*, 306 F. 2d 439, 452-453 (2d Cir. 1963); *Zogby* v. *State*, 279 N.Y.S. 2d 665, 669 (1967); 4 Nichols', *The Law of Eminent Domain* § 12.322 at 236; 1 Orgel, *Valuation Under Eminent Domain*, § 105 at 447 (2nd ed.)

found that there existed, if not the certainty, a very high degree of probability, that the alleys would have been closed. The proffer was made that it has been the practice of the District of Columbia for many years to agree to alleys closings where application is made and there is no opposition from contiguous landowners.[2] The District of Columbia stated that since 1952, it had not charged for alley closings and that since 1912, there were only eight instances where charges were made for closings. (JA 23)[3] Thus the closing of the alleys would have substantially increased the value of Reservation 11.

CONCLUSION

Since the only acceptable evidence on the probability that the alleys would have been closed and Reservation 11 assembled into one unit is anything but remote or speculative, the District Court erred in not allowing the jury to determine the extent which this probability of closing influenced the fair market value of Reservation 11. This Court should reverse the District Court judgment and remand for a new trial.

Respectfully submitted,

PAUL R. CONNOLLY
1000 Hill Building
Washington, D. C. 20006
Attorney for Appellant

Of Counsel:

WILLIAMS & CONNOLLY
Washington, D. C.

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[2] A proffer is to be accepted as proven fact: "The Court's understanding of a proffer is that when a party makes a proffer, he offers to prove those facts and the Court ruled on the proffer on the assumption that the facts offered would be proven." (JA 21)

[3] Earlier in the proceedings the District of Columbia had stipulated that between 1912 and March 1, 1967, there had never been any charges for alley closings. (JA 15)

COUNTER-STATEMENT OF ISSUE PRESENTED

Where the Government, for years prior to the institution of eminent domain proceedings, had contemplated the acquisition, for highway purposes, of privately-owned property intersected by public alleys and had consistently refused to act favorably upon applications for the closing of such alleys, did not the trial judge, in the ensuing eminent domain proceedings, properly restrict the jury to a determination of the fair market value of the property as it presently exists without giving any consideration to possible alley closings?

This case has not been before the Court on any prior occasion.

I N D E X

Page

SUBJECT INDEX

CASES CITED

DISTRICT OF COLUMBIA CODE, 1967, CITED

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* Cases chiefly relied upon are marked by asterisks.

UNITED STATES COURT OF APPEALS
For The District Of Columbia Circuit

No. 22,142

RESERVATION ELEVEN ASSOCIATES, et al.,

Appellants,

v.

DISTRICT OF COLUMBIA

Appellee.

Appeal From The United States District Court
For The District Of Columbia

STATUTES INVOLVED

District of Columbia Code, 1967

§ 7-302. Useless alleys - Sale of original alleys - Reversion of title to owner.

If in the opening, extension, widening, or straightening of an alley or minor street, or in the extension or widening of public streets or highways, an alley or part of an alley may have been, or may hereafter be, in the judgment of the said commissioners rendered useless or unnecessary, said commissioners are authorized to close the same. If the alley to be closed is an original alley, they may sell the land contained therein for cash at a price not less than the assessed value of contiguous lots. If the alley is not an original alley, the title thereto

shall revert to the owners of the land abutting thereon, but all such land shall be subject to the assessment for benefits hereinafter referred to. (Mar. 3, 1901, ch. 854, § 1608a, as added Feb. 23, 1905, 33 Stat. 733, ch. 734.)

§ 7-303. Alleys may be closed on dedication of new ones - Application of property owners - Future ownership of closed alleys - Plats recorded.

The said commissioners are authorized to accept the dedication of an alley or alleys and in connection therewith to close any existing alley or alleys in the square or block in which such dedication is made upon the application of the owners of all the property abutting on such existing alley or alleys. If the alley proposed to be closed is an original alley, the party or parties making the dedication and the parties applying for the closing of the alley or alleys shall present with such application a mutual agreement in writing and under seal, in duplicate, as to the future ownership of the land contained in the alley or alleys to be closed, together with two plats showing the alley or alleys divided into parcels, with the name of the future owner marked on each parcel, in accordance with such agreement. Copies of the order of the commissioners accepting the dedication and closing the original or subdivisional alley, together with the said agreements and plats in the case of an original alley, shall be forwarded by said commissioners to the surveyor and recorder of deeds of the District of Columbia for record, and thereafter the title to the land in such subdivisional alley shall revert to the owners of the land abutting thereon, and the title to the land in the original alley shall vest in the parties whose names appear on said plat in accordance with said agreement. (Mar. 3, 1901, ch. 854, § 1608b, as added Feb. 23, 1905, 33 Stat. 733, ch. 734.)

§ 7-305. Alleys closed for single improvement on two-thirds of square.

Whenever the title in fee simple to an entire square is vested in one person or tenants in common or partners, and such owner or owners desire to improve said square by the erection thereon of a building covering not less than two-thirds of the area thereof, or to use said square for the purpose of some business enterprise, the commissioners are authorized, in their discretion, to order any alley or alleys in such square to be closed, and a copy of said order shall be filed with the surveyor and recorder of deeds of said District for record. (Mar. 3, 1901, ch. 854, § 1608d, as added Feb. 23, 1905, 33 Stat. 734, ch. 734.)

§ 7-401. Street Readjustment - Closing of unnecessary public ways authorized - Disposition of property - Reference to Planning Commission.

The Commissioners of the District of Columbia are authorized to close any street, road, highway, or alley, or any part of any street, road, highway, or alley, in the District of Columbia when, in the judgment of said commissioners, such street, road, highway, or alley, or such part of a street, road highway, or alley, has been rendered useless or unnecessary, the title to the land embraced within the public space so closed to revert to the owners of the abutting property subject to such compensation therefor in money, land, or structures as the commissioners of the District of Columbia in their judgment, may find just and equitable, in view of all the circumstances of the case affecting near-by property of abutters and/or nonabutters: Provided, That if the title to such land be in the United States the property shall not revert to the owners of the

abutting property but may be disposed of by the said commissioners to the best advantage of the locality and the properties therein and thereby affected, which properties thenceforth shall become assessable on the books of the tax assessor of the District of Columbia in all respects as other private property in the District; or also said property be sold as provided in section 7-302 this title, unless the use of such land is requested by some other department, bureau, or commission of the government of the United States for purposes not otherwise inconsistent with the proper development of the District of Columbia: Provided further, That the said closing by said commissioners is made expedient or advisable by reason of change in the highway plan or by reason of provision for access or better access to the abutting or nearby property and the convenience of the public by other street, road, highway, or alley facilities, or by reason of the acquisition by the District of Columbia or by the United States of America for school, park, playground, or other public purposes, of all the property abutting on the street, road, highway, or alley, or part of a street, road, highway, or alley, proposed to be closed or for other public reasons: And provided further, That the proposed closing of any street, road, highway, or alley, or any parts thereof, as provided for in this chapter shall be referred to the National Capital Planning Commission for its recommendation. (Dec. 15, 1932, 47 Stat. 747, ch. 4, § 1.)

ARGUMENT

The probability of the public alleys being closed was so remote that a jury could not reasonably conclude that it would affect the fair market value of the property being condemned.

Appellants' sole point on appeal is that the trial judge erred in directing the jury to ascertain the value of the property being condemned as five separate parcels without giving any consideration to the prospect of the public alleys being closed and transferred to them. Appellants have set forth here, as they did below, three separate theories under which they say the alleys could have affected the fair market value of their property. First, they assert that the District of Columbia arbitrarily refused to close the public alleys, and that as a consequence their property should be valued as one parcel, as it would have been if the alleys were in fact closed and transferred to them. Secondly, they say that the jury should have been permitted to consider whether there was a reasonable probability that the alleys would be closed and transferred to them, and, if the jury so found, the effect that such reasonable probability would have on the fair market value of the property. Appellants' third theory is that, upon dedication by them of a tract of land extending along the northern portion of their property equal to the square footage of the public alleys, the District of Columbia would, under

Section 7-303, D. C. Code, 1967, have been required to close the public alleys and give the land to them.

The trial judge, in two well-reasoned opinions, rejected each of these theories (A. 16, 26). As to the first theory, i.e., that the District arbitrarily refused to close the public alleys and that appellants' property, therefore, should be valued as if the alleys were in fact closed and in appellants' ownership, the trial judge stated:

> "* * * Whether the applications for closing be considered to have been made under Chapter IV, Title VII, Sec. 401, as the Government contends, or under Chapter III, Title VII, Sec. 305, as the landowners contend, the Commissioners had discretion, their function with respect to alley closing is not purely ministerial and routine, and their unwillingness to allow the alleys to be closed was not shown to be arbitrary under the circumstances, particularly when there was no showing that an alley closing has ever been permitted where a public taking was in prospect. Cf. Nash v. D. C. Redevelopment Land Agency, U. S. App. D. C. No. 20,410, decided October 23, 1967." (A. 18.)

The statutes cited by the court clearly show that it is discretionary with the District as to whether a particular public alley should be closed. Furthermore, where it appears that the District needs public alleys as well as the property adjoining the alleys for the construction of a public highway, it defies reality to say that the failure of the District to close such public alleys and give the land to the adjacent property

owner constitutes an arbitrary exercise of governmental power. On the contrary, the approval of an application under such circumstances would, at the very least, constitute an unwarranted dissipation of public resources for the benefit of a few private individuals. Although, as shown in the court below, the District has closed public alleys and has, on various occasions, given the land to the adjacent property owner, the purpose in so doing was to benefit the public as a whole, such as, for example, facilitating the construction of a large unit, thereby increasing the tax base. At no time, to the knowledge of counsel for appellee (and appellant has shown nothing to the contrary), has the District given away its property knowing that it will, within a short period of time, need to repurchase it for some public improvement.

Appellants' argument is somewhat similar to that advanced in Nash v. D. C. Redevelopment Land Agency, ____ U. S. App. D. C. ____, 395 F. 2d 571, 572 (1968), cited by the trial judge in his first opinion. There the property owner asserted that the District Court erred in proceeding with the condemnation action before determining whether certain alleys had been closed and thereby made a part of the condemned property. After noting that "[t]he district judge concluded that the alleys were not closed because the Commissioners of the District of Columbia had not taken the necessary action to close them," this Court, in affirming the judgment of the District Court, stated:

> " * * * The discretion exercised by the district judge with respect to the zoning and alley questions so plainly warrants no correction by us that we do not pursue the matter further."

Since the condemnation jury in Nash, supra, where it was contended that the alleys were in fact closed, was not required to value the property being taken on the basis that the alleys were closed, a fortiori the jury here, where it was not contended that the alleys were in fact closed but merely that they should have been closed, certainly should not be required to value appellants' property on the basis that such alleys had been closed.

Appellants' second alternative theory, that the jury should have been permitted to consider whether the probability of the alleys being closed was sufficiently reasonable as to affect the fair market value of the property being acquired, is equally without substance. Before such a question can properly be presented to the jury for its consideration, some supporting evidence must be adduced. This Court, in the case of H & R Corporation v. District of Columbia, 122 U. S. App. D. C. 43, 45, 351 F. 2d 740 (1965), which involved the propriety of refusing to submit to the condemnation jury the question of the reasonable probability of a change in zoning, cautioned that

> "The judge has a responsibility to prevent the jury from indulging in baseless speculation about future changes in zoning. In our view the judge's responsibility is to determine whether a jury would be justified in concluding on the evidence that a willing buyer at the time of taking would have taken into account the possibility of rezoning in deciding the fair market value of the condemned property. If it would, the judge should instruct the jury to take into account the possibility of a zoning change. Only if the trial judge is satisfied that a jury could not reasonably conclude that the possibility of a zoning change would affect the fair market value should he instruct the jury to disregard that element of value. In deciding whether there is sufficient evidence for the jury, the trial court should not resolve questions of credibility. But a jury question is not presented by a witness' bare assertion that zoning change was probable. His opinion must have some foundation in fact. * * * "

See also Olson v. United States, 292 U. S. 246, 257 (1934).

Appellants neither presented nor proffered any evidence that, at the time of taking, which was December 22, 1965, there existed any reasonable probability that the public alleys would be closed and transferred to them. The fact that the District has, in the past, closed public alleys not needed for a municipal improvement and, on occasion, given the land to the adjacent property owner, is certainly not probative. It must have been apparent to all, many years prior to the date of taking, that the public alleys in Reservation Eleven would be needed for highway purposes and, therefore, would not be closed. Certainly it was appar-

ent to appellants and their predecessors in title. Appellants purchased the property from Parkwood, Inc. in December 1964 (Tr. 29, 35),[1] whereas the highway had been proposed 18 years earlier in December 1946. At the time of such acquisition, the highway had been approved by various governmental agencies, commissions, congressional committees, and by the Congress (A. 24-25). In fact, the highway had been proposed and approved by the District of Columbia, the Bureau of Public Road, and various commissions prior to the date of acquisition by Parkwood, Inc. (A. 24-25).[2]

Parkwood, Inc. began to assemble the property in 1958, and completed the assemblage in February 1962 (Tr. 9). Its requests to close some of the public alleys in October 1959 and the remainder of the public alleys in October 1961 were opposed by the District of Columbia Department of Highways and were, as a consequence, never favorably acted upon by the District (A. 17). This, coupled with the

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[1] References to "Tr." are to the transcript of proceedings of February 6, 1968.

[2] Although the record is not entirely clear as to the identity of all the appellants, it does show that Parkwood, Inc. has a financial interest in the property and is a member of Reservation Eleven Associates (Tr. 4). Perhaps Parkwood, Inc. is an appellant in its own right. (For convenience, the owners have been referred to as the appellants. This is not technically correct, however, since the action is in rem.)

fact that in 1958 "ESSO," who at that time owned a substantial portion of the square, was unsuccessful in its attempt to get one of the alleys closed (Tr. 51, 53), undoubtedly helped make it possible for Parkwood, Inc. to acquire the whole reservation for $5,828,430 less than the jury verdict (A. 27, 29). In view of all this, no reasonable person could possibly find that there existed, on December 22, 1965, any probability that the public alleys would be closed.

Ordinarily this would end the matter, but appellants insist that since, absent eminent domain proceedings, past practice indicates a reasonable probability that the alleys would be closed and transferred to them, the same result must follow, as a matter of law, when eminent domain proceedings are contemplated. Otherwise, they say the District would be permitted

> "* * * to control the condemnation award irrespective of its fair market value. It permits the District apparently to offer fair market value for property while actually reducing that value so as to save money. Fair market value becomes not what a willing buyer and a willing seller would agree upon, but a value determined with the District's thumb on the scales." (Appellants' brief at 7-8.)

Appellants attempt to bring this case within the principles of law enunciated in the various cases where the condemning authority, in an effort to depress the value of privately-owned property it contem-

plated condemning for a public use, arbitrarily refused to grant an application for a deserving zoning change. Those cases, however, are not at all apposite. There the property involved was owned by the condemnees and quite obviously the Government could not, by arbitrarily refusing to grant a change in zoning to which such condemnees were entitled, affect the fair market value of the property. Here, however, the public alleys are owned by the condemnor, and appellants have referred the Court to nothing which would indicate that the Government must relinquish ownership of its property in order that the property of the condemnee may be rendered more valuable.

This case is much more analogous to U. S. ex rel T. V. A. v. Powelson, 319 U. S. 266 (1943), than it is to the zoning cases cited by appellants. In Powelson, the condemnee, which was a public utility, contended that the valuation of the property being condemned should be based on the theory that it, together with other property owned by the condemnee, could be united with numerous other tracts owned by strangers, thereby resulting in a tract of sufficient size to construct an elaborate hydro-electric project. The condemnee had been granted the power of eminent domain to accomplish such an undertaking, but had not, at the time of taking by the United States, exercised such authority. The issue was whether the condemnee's authority to exercise

to power of eminent domain may be considered by the jury in determining whether there was a reasonable probability that the property in question would be united with the property of others. The Supreme Court concluded that it could not be considered, stating:

> "The law of eminent domain is fashioned out of the conflict between the people's interest in public projects and the principle of indemnity to the landowner. * * * Equity and fair dealing do not require the payment by the United States to the landowner of the amount of a valuation of his lands based on the existence of his privilege to use the power of eminent domain. It is 'private property' which the Fifth Amendment declares shall not be taken for public use without just compensation. The power of eminent domain can hardly be said to fall in that category. It is not a personal privilege; it is a special authority impressed with a public character and to be utilized for a public end. An award based on the value of that privilege would be an appropriation of public authority to a wholly private end. The denial of such an award to the landowner does no injustice. * * *
>
> "This public project, to be sure, has frustrated respondent's plan for the exploitation of its power of eminent domain. We may assume that that privilege was a thing of value and that this frustration of the plan means a loss to respondent. But our denial of compensation for that loss does not make this an exceptional case in the law of eminent domain. There are numerous business losses which result from condemnation of properties but which are not compensable under the Fifth Amendment. * * * " (Pages 280, 281.) [Footnote omitted.]

So it is here. Even assuming that, absent eminent domain proceedings, the public alleys would have been closed and transferred to appellants,[3] such a prospective gratuity is no more compensable in eminent domain proceedings than was the actual gratuity in Powelson, supra. Certainly in Powelson the prospects, absent eminent domain proceedings by the United States, of assembling a large tract of land for the construction of a hydro-electric plant were quite certain, thereby rendering the property being condemned by the United States much more valuable than it otherwise would have been. Since the Supreme Court held that the privilege of eminent domain granted to Powelson by the Government was not private property and, hence, not compensable, it necessarily follows that the prospective privilege (again assuming that it was prospective) of using the District's public alleys is not private property and, hence, is not compensable.

Appellants' third alternative theory under which they say the alley question should have been presented to the jury is that the District was required, upon a dedication by the appellants to the District of a parcel of land extending along the northern portion of their property

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[3] As noted by the trial judge (A. 19), since the public alleys are owned by the United States, it is not at all certain that the closing of the public alleys would have benefited appellants.

equal to the square footage of the alleys, to close the existing alleys and transfer them to appellants. The trial judge, after noting that no such proposal or application was ever made by appellants, fully disposed of the argument, saying

> "This proffer is subject to the same infirmities indicated in this Court's prior decision in that any such application would have to be made against the long-standing prospect that the freeway would go through the property. The Court concludes that the District under Section 303 has a discretionary authority which it may or may not exercise if and when application is made and there is no reasonable possibility that this discretion would be exercised in favor of Reservation 11 under the circumstances. The District would not relocate the property in Reservation 11 owned by the United States so as to enable the owners to obtain a higher value for the land likely to be taken by condemnation. * * * Further, the Court concludes as a matter of law that Section 303 [Title 7, D. C. Code, 1967] does not contemplate the total extinction of alleys to be substituted, in effect, by a parcel of open land. * * * " (A. 26-27.)

An examination of Section 7-303, D. C. Code, 1967, supra, will reveal that the trial judge correctly concluded that the purpose of the statute was to permit the District to accept a dedication of land in order that public alleys may be relocated rather than being totally extinguished. The statute certainly does not require the District to agree to a proposal designed solely for the benefit of one individual or group of individuals to the complete detriment of the public as a whole.

CONCLUSION

In view of the foregoing, it is respectfully submitted that the judgment of the court below was in all respects correct and should, therefore, be affirmed.

CHARLES T. DUNCAN,
Corporation Counsel, D. C.

HUBERT B. PAIR,
Principal Assistant Corporation
Counsel, D. C.

RICHARD W. BARTON,
Assistant Corporation
Counsel, D. C.

JOHN R. HESS,
Assistant Corporation
Counsel, D. C.

Attorneys for Appellee,
District Building,
Washington, D. C. 20004

REPLY BRIEF FOR APPELLANT

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,142

RESERVATION ELEVEN ASSOCIATES, ET AL., *Appellant*

v.

DISTRICT OF COLUMBIA, *Appellee*

On Appeal from a Final Judgment of the U. S. District Court for the District of Columbia

PAUL R. CONNOLLY
1000 Hill Building
Washington, D. C. 20006
Attorney for Appellant

Of Counsel:

WILLIAMS & CONNOLLY
Washington, D. C.

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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REPLY BRIEF FOR APPELLANT

In its answering brief the Appellee attempts to reply to what it characterizes as "three separate theories" which support the Appellant's argument that the District Court erred in not allowing the condemnation jury to consider the value added to the Appellant's property by the probability that the alleys on the property would be closed and that the property would be assembled into one unified tract. (Appellee Br. 5)

These "theories" which the Appellee then proceeds to answer are:

1. The District of Columbia arbitrarily refused to close the alleys on the Appellant's property and that as a consequence the property should be valued as one parcel, as if the alleys were in fact closed and transferred to the Appellant;

2. The District of Columbia was required, upon a dedication by the Appellant to the District of land extending along the northern portion of its property equal in area to the existing alleys, to close the existing alleys and transfer them to the Appellant;

3. The probability that the alleys would be closed and that the property would be assembled into one unified tract was of such a substantial degree as would effect the market value of the Appellant's property.

The first two "theories" which the Appellee answers appear nowhere in the Appellant's brief. The Appellant does not assert that the jury should have considered the alleys as closed and transferred to it. This point is made quite clear in the Appellant's brief where, at page 6, it states:

> "However, condemned property is not to be valued by a condemnation jury as if it were in fact being used for its higher and more valuable purpose. Its valuation should depend upon the degree to which the probability of future use affects the market price."

What the District has done is to create two straw arguments whose destruction would seem to lend a sense of conviction to its brief.

The Appellant, however, does press the "third theory" in its brief. It clearly contends that the District Court erroneously held that the value of the condemned land

could not be affected by the probability that the alleys would be closed. Appellant argued that the District Court's determination of a lack of probability that alleys would be closed relied upon an irrelevant consideration, to wit: that the District would not close alleys if its effect would be to require it to pay a higher price for land which it intended to condemn. In support of this argument, the Appellant cited court decisions which have held that the probability of land changes should not reflect the condemnor's opposition to such changes when the opposition is posited on a desire to depress the market value of property it intends to condemn.

In opposition, the District argues that there did not exist any reasonable probability that the alleys on Appellant's property would be closed and the tract unified. This contention is made by ignoring the court decisions cited by the Appellant and relying for proof on the District of Columbia's desire to condemn the Appellant's property and to concomitantly depress its fair market value.

If the court decisions cited by the Appellant are followed, the District's contention that reasonable probability did not exist is without merit. The District has stipulated that its opposition to closing the alleys was based on its desire to condemn the land. (JA 15) The only other evidence on the probability of the alleys being closed supports the existence of a high degree of probability that the alleys would be closed. It was proferred by the Appellant that it had been the practice of the District of Columbia for many years to agree to alley closings where application is made and there is no opposition from contiguous landowners. (JA 17) The District of Columbia stated that since 1952 it had not charged for alley closings and since 1912 it has charged for only eight alley closings. (JA 23) A new argument in support of the Appellant's contention that the probability shows that the alleys would have been closed is found in the Appellee's brief. The Appellant desired to close the alleys so as to unify five

small parcels into one large tract. The District states at page 7 of its brief:

> ". . . the District has closed public alleys and has, on various occasions, given the land to the adjacent property owner, the purpose in so doing was to benefit the public as a whole, such as, *for example, facilitating the construction of a large unit thereby increasing the tax base.*" (emphasis supplied)

The District, granting that the court decisions cited by the Appellant are not inapposite to this case, nevertheless attempts to distinguish them. Its ground for distinction is that the decisions cited by the Appellant concern the refusal of governments to grant zoning changes because the government desired to condemn the land and to depress its market value and that this case concerns a government's refusal to close alleys because it desired to condemn the land and to depress its market value. Whether it is zoning changes or alley closings is immaterial. This is made quite clear by the language of the decisions cited by Appellant. The Appellant does not wish to belabor the point by repetition, but nevertheless feels that it must again quote in part one of these opinions:

> "The owner of lands being entitled to their fair market value for the most profitable use for which the property is available, this use cannot be cut down because the condemnor is in a position to refuse a consent necessary to make available the lands for such use, and does so refuse because of the effect upon the price in a contemplated condemnation. Each owner, so long as he is holding the property, is entitled to be considered in the same position as if his lands were not to be sought in condemnation." *In Re Innwood Hill Park, in Borough of Manhattan,* 243 N.Y.S. 63, 70-71 (1930)

The District also contends that this case is "much more analagous" to *U.S. ex rel T.V.A.* v. *Powelson,* 319 U.S. 266 (1943), than it is to the cases cited by the Appellant. The *Powelson* case might be analagous, but not for the

reasons cited by the District. The Supreme Court held that the value of condemned property

> "may be determined in light of the special or higher use of the land when combined with other parcels; it need not be measured merely by the use to which land is or can be put as a separate tract. But in order for that special adaptability to be considered, there must be a reasonable probability of the lands in question being combined with other tracts for that purpose in the reasonably near future. In absence of such a showing, the chance of their being united for that special use is regarded 'as too remote and speculative to have any legitimate effect upon the valuation.'" *id,* at 275-276, citations omitted.

The owner of the condemned land in *Powelson* sought to show that the probability of the land being united was neither too remote nor too speculative by claiming that its power of eminent domain made such probability reasonable. The Court held that, in estimating the degree of probability, the power of eminent domain should not be considered.

> "The result is that Respondent's privilege to use the power of eminent domain may not be considered in determining whether there is a reasonable probability of the lands in question being combined with other tracts into a power project in the reasonably near future. It the power of eminent domain be left out of account, the chances of making the combination appear to be too remote and slim 'to have any legitimate effect upon the valuation.'" *id.* at 285.

In *Powelson,* there exists the unusual situation of the property owner seeking to use its power of eminent domain to determine the degree of probability of a future land development. In this case, the condemning party is seeking to use its power of eminent domain to determine the degree of probability of a future land development. In *Powelson,* the property owner was not allowed to take

advantage of its power of eminent domain. In this case, the District of Columbia should be similarly thwarted.

The Appellant, however, would be remiss if it did not point out that *Powelson* presents a situation foreign to this case both in its facts and in the law enunciated by the Court. The property owner sought to use its power of eminent domain to show that it could condemn other land to develop a massive hydro-electric plant. It further desired to show that the capitalized net return from the operation of the hydro-electric plant was 7.5 million dollars for the particular tract taken. In determining the value of the tract taken, the Court valued it taking into consideration its potential use as a hydro-electric plant. It held evidence regarding use of the property owner's power of eminent domain irrelevant because

> "[t]he fruits of the exercise of that power of eminent domain are not being appropriated here," *id.* at 280-81

The Court further stated that the condemnor must pay only for what it takes and not for any collateral business opportunities which the property owner may lose. Thus, the *Powelson* case stands for the proposition that a condemnor need not compensate a property owner for the loss of the profits of a business which might be operated on the property. This rule has recently been succinctly restated in *A. G. Davis Ice Company* v. *U.S.*, 362 F.2d 934, 936 (1st Cir. 1966)

> "The long accepted general rule is that evidence of profits derived from a business conducted on property which is condemned is too speculative, uncertain and remote to be considered as a basis for computing or ascertaining its market value in condemnation proceedings. Such profits are not generally considered property within the meaning of the constitutional provision forbidding the taking of property by eminent domain except upon payment of just compensation."

This case does not involve the problem of compensating for a lost business opportunity. The Appellant does not contend that the property should be valued taking into consideration the prospective profits of a business enterprise that could be conducted on its land. All it contends is that the probability of the alleys on its land being closed affected the fair market value of the property and that this factor should have been taken into consideration by the condemnation jury.

CONCLUSION

An inspection of the arguments and case law set forth by the Appellee in its brief and the foregoing arguments of the Appellant can only lead to the conclusion set forth in Appellant's first brief, "that this Court should reverse the District Court's judgment and remand for a new trial."

PAUL R. CONNOLLY
1000 Hill Building
Washington, D. C. 20006
Attorney for Appellant

Of Counsel:

WILLIAMS & CONNOLLY
Washington, D. C.